

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 09-105905

Employee: Mary Slinkard

Employer: Campbell Mattress Co., Inc. (Settled)

Insurer: Technology Insurance Company (Settled)

Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 14, 2013. The award and decision of Administrative Law Judge Maureen Tilley, issued February 14, 2013, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 5<sup>th</sup> day of September 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
John J. Larsen, Jr., Chairman

\_\_\_\_\_  
James G. Avery, Jr., Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

**ISSUED BY DIVISION OF WORKERS' COMPENSATION**  
**FINAL AWARD**

Employee: Mary Slinkard

Injury No. 09-105905

Dependents: N/A

Employer: Campbell Mattress Co Inc. (Settled)

Additional Party: Second Injury Fund

Insurer: Technology Insurance Company

Hearing Date: December 5, 2012

Checked by: MT/rmm

**SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? Yes.
2. Was injury or occupational disease compensable under Section 287? Yes.
3. Was there an accident or incident of occupational disease under the law? Yes.
4. Date of Accident or onset of occupational disease? September 3, 2009.
5. State location where accident occurred or occupational disease contracted: Cape Girardeau County, Missouri.
6. Was above employee in the employment of above employer at the time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: Employee was carrying mattress tops at Campbell Mattress Company when she felt a pop either in her neck and shoulder and was injured.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease? Right shoulder and neck.
14. Nature and extent of any permanent disability: See Award.
15. Compensation paid to date for temporary total disability: \$11,550.06 representing 36 weeks and 6 days.
16. Value of necessary medical aid paid to date by employer-insurer: \$105,346.50.
17. Value of necessary medical aid not furnished by employer-insurer: N/A.
18. Employee's average weekly wage: \$470.01.
19. Weekly compensation rate: \$313.34 for both permanent partial disability and permanent total disability purposes.
20. Method of wage computation: By agreement.
21. Amount of compensation payable: See findings.
22. Second Injury Fund Liability: Liable for permanent-total disability benefits.
23. Future requirements awarded: N/A.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Chris Weiss.

## **FINDINGS OF FACT AND RULINGS OF LAW**

On December 5, 2012, Mary Slinkard appeared in person for hearing on her claim against the Second Injury Fund. Employee was joined by her attorney, Chris N. Weiss. The Employer was not present because of settlement of the primary claim with the Employer/Insurer. The Second Injury Fund was represented by Jonathan J. Lintner. At the time of the hearing the parties agreed on certain undisputed facts and identified the issue that was in dispute. These undisputed facts and issue together with the findings of fact and rulings of law are set forth below as follows:

### **UNDISPUTED FACTS:**

1. On or about September 3, 2009, Campbell Mattress Company, Inc. was the Employer of Employee and operating under and subject to the provisions of Missouri Workers' Compensation Act and its liability were insured by Technology Insurance Company.
2. On or about September 3, 2009, Employee was an employee of Campbell Mattress Company, Inc. and was working under and subject to the provisions of the Workers' Compensation Act.
3. On or about September 3, 2009, the Employee sustained an accident or occupational disease arising out of and in the course of his employment.
4. The Employer received notice pursuant to law.
5. The Employee's claim was filed within the time allowed by law.
6. The average weekly wage of the Employee was \$470.01 and the rate for temporary total disability and permanent total disability was \$313.34 and the rate for permanent partial disability was \$313.34.
7. Medical causation: Employee's injury was medically causally related to accident or occupational disease.
8. The Employer-Insurer paid \$105,346.50 in medical aid.
9. The Employer-Insurer paid \$11,550.06 representing 13 weeks and 6 days in temporary total disability benefits.
10. The parties have agreed that the date of maximum medical improvement was October 9, 2010.

**ISSUE:**

1. Liability of the Second Injury Fund. Either permanent partial disability or permanent total disability.

**EXHIBITS:**

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Maryland Heights Orthopaedic Arthroscopic Associates, P.C. - medical records 1996.
- B. Dr. Anthony Keele of Cape Family Practice - Medical records (1/5/2007-3/3/2010).
- C. Cape Family Practice letter dated 10/11/11.
- D. Orthopaedic Associates medical records - Brian Schafer (1/3/2001-10/9/2012).
- E. Physician's Alliance Surgery Center - 5/17/10 Right Shoulder - Operative Report
- F. Brain & NeuroSpine Clinic medical records.
- G. Select Physical Therapy - Functional Capacity Evaluation of 09/14/10.
- H. Deposition of Dr. Shawn Berkin.
- I. Deposition of Dr. Jeffrey Magrowski.
- J. Stipulation for Compromise Settlement #95-168057 (right arm 10%).
- K. Stipulation for Compromise Settlement #06-136224 (7.7% right shoulder).
- L. Stipulation for Compromise Settlement #08-124489 (12.5% left elbow).
- M. Stipulation for Compromise Settlement #09-105905 (25% right shoulder and 25% neck).
- N. Statement of David Propst.
- O. Community Counseling Center records.

The Second Injury Fund did not offer any exhibits into evidence.

**FINDINGS OF FACT**

**Employee's Testimony:**

The Employee testified that she currently resides in Cape Girardeau, Missouri. She is a single person and has two grown children neither of which lives at home. She was born on October 1, 1954, and was 58 years of age at the time of the hearing. She attended Chaffee High School through the eleventh grade and quit because she was pregnant. She later completed her GED in approximately 1975 in the State of Arkansas. She has not received any vocational training or college courses.

She went to work when her children were approximately the ages of four and six. She first worked as a waitress in 1975 through 1976 for about one year in the State of Arkansas. She moved back to Missouri in about 1976 and went to work at the Thorngate factory in Cape Girardeau in about 1978. She was a full-time seamstress. From 1978 to 1984, she went to work at Bohannes, which is a cleaning service. There she worked as a tailor. From 1985 through

1988, she worked at the Venture store in retail, as the assistant customer service manager. From 1988 to 1990, she moved to the State of Texas. From 1990 through 1994, she was back in Cape Girardeau, Missouri and worked at the Rapco plant in Fruitland, Missouri in cable production. In approximately 1994 or 1995, she worked at Custom Design Interiors in their sewing department. She worked there for approximately six months. From 1994 through 1996, she again worked at Major Custom Cable doing cable production work including soldering. From 1996 through 1998, she worked at Quantum, which is another cable producer. In 2001, she began working at Campbell Mattress in Cape Girardeau and worked there until October 2010. During that time she performed all the factory's positions in manufacturing mattresses. In October 2010, she took a job at the Radio Shack in sales with the assistance of the manager who was her friend, David Propst. She had known David Propst as they are both leaders of her grandson's Boy Scout troop. She worked there almost full time but because of difficulties in performing the duties of her job, was shifted to seasonal work and let go on December 24th. During the time between her job with Campbell Mattress and Radio Shack she was off work and received temporary total disability benefits of approximately 36 weeks.

Mary testified that she is addicted to drugs and alcohol and that began in 1988 when she lived in the State of Texas. There she became addicted to alcohol. In later more recent years, she became addicted to pain killers following her surgeries.

In 1995, while working at Custom Design Interiors, she developed carpal tunnel syndrome in her right wrist and underwent surgery by Dr. Steven Benz. She settled that claim for 10% of the right wrist at the 175 week level.

In 2006, she injured her right shoulder and was referred by Campbell Mattress to Dr. Schafer. He did injections to the shoulder and prescribed physical therapy. She testified that Campbell Mattress did not want to turn this into Workers' Compensation and they paid the bills directly and not through Workers' Compensation. She settled that claim for 7.2% of the right shoulder.

In March 2008, she developed problems with her left elbow and was referred by her employer, Campbell Mattress, to Dr. Keele in Cape Girardeau. He did approximately seven to eight injections to her left elbow. Campbell Mattress again directly paid the medical bills. She settled that claim in November 2011 for 12½% permanent partial disability at the level of the elbow. She testified that following the treatment she continued to have problems with the elbow including loss of strength, numbness in her fingers, range of motion and being painful with use. She also testified that following the left elbow treatment she continued to have problems in performing the duties of her job at Campbell Mattress. She was placed on five different jobs, each successive job being of lighter duty. The last job that she had was doing "border surging". She said that this is the least physical job and was made even less physical by the fact that someone else would load her material for her. She described the border surging job as running a sewing machine to sew up the material along the edge of the mattress. Mary was fully trained on all the different jobs at Campbell Mattress and could train others. Only one other female had more seniority than her at Campbell Mattress.

Mary testified that she did not do any overtime work, or at least as much as the other workers, because of her arm problems.

On the date of the accident of September 3, 2009, she was not doing her border surging job because someone else had not reported to work that day. She was assigned to a more physical job that day and originally was receiving help from a co-employee in carrying panels. However, she complained and was then told she would have to carry the 50 to 60 pound mattress panels by herself. While she was putting a mattress panel upon the stack while carrying it overhead she felt a pop in either her neck or shoulder and immediately felt pain down her arm and in her neck. She reported the accident and was referred to Dr. Keele and saw him on September 3, 2009. An MRI was taken of the neck on December 8, 2009, and she was referred to the neurosurgeon, Dr. Vaught. On February 4, 2010, he performed a neck discectomy at the C5-6 level. She was then referred to Dr. Schafer for treatment of the right shoulder and an MRI was taken on February 26, 2010. Dr. Schafer performed surgery on May 17, 2010, on the shoulder.

Mary eventually settled the September 3, 2009 claim, for 25% of the right shoulder and 25% referable to the neck. She was released by Dr. Schafer on October 9, 2010, and that establishes her maximum medical improvement date. She was given lifting restrictions by Dr. Schafer following a functional capacity evaluation. She has not worked any other jobs since her release from the job at Radio Shack. She stated she has applied for at least fifteen different types of jobs and was seeking out jobs with lighter duties including being a receptionist or security guard at the Mall. However, she has not been hired. She contacted Vocational Rehabilitation and was not provided any services. Mary has applied for Social Security disability, was initially denied but is set for a hearing in February 2013.

Mary testified that she believes that she has some mental limitations in that she transposes numbers and has memory problems. She stated this was readily evident when she worked at Radio Shack in that she had a lot of problems in trying to take inventory, remembering and selling cell phones and their plans. She said that she repeatedly had to ask questions of her supervisor and other workers and that they did not appreciate that. She associated these mental insufficiencies with her alcohol and drug addiction.

Mary testified she believes that she is unemployable for the reason that she has limitations in both of her arms, has problems with her neck, she has tried Vocational Rehabilitation and they were unable to provide any services and was unsuccessful in finding any work, even lighter duty work.

Mary testified that she has difficulty in sleeping and takes Clonipan to assist her. During an average day she has some activities including going to Bible study twice a week, eating supper with her children twice a week, doing some light sewing, going to three to four recovery meetings per week, going to the gym and trying to work on her arms. She testified that she also walks on the track but cannot use a treadmill because she cannot swing her arms. She stated she gets headaches and her fingers go numb if she tries to work on the computer for very long. She no longer can crochet because afghans are too heavy for her to work with. She cannot mow her yard anymore, cannot place her arms behind her and has difficulty in pulling off a t-shirt because

of the motion of pulling it over her head. She has difficulty in opening the windows in her mobile home and has difficulties in holding a seven pound newborn baby without someone supporting her elbows or her resting her elbows on her lap for support. She has difficulty in getting very many groceries at a time and carries only what she can. She has difficulties on putting on a seatbelt and also has difficulty in turning two shower knobs at one time. She now uses both hands to turn one shower knob at a time. She cannot drive far because she develops headaches. She is no longer active as a Boy Scout leader with her grandson's troop because of her physical difficulties in trying to keep the boys corralled. She can no longer use a curling iron and cannot sleep on her right side.

Upon cross-examination from the Attorney General's Office, she stated she does not think that she can even work on a part-time basis and it would not be fair to an employer to ask someone to hire her with her limitations. She testified that when she saw Dr. Berkin, his records indicate that she had right wrist problems in 1995 and 1996. In 1965, she had her tonsils out, in 1976, had an appendectomy, a hysterectomy in 1993 and colon surgery in 1977. Other than those surgeries and the surgery on her right wrist she did not have any other surgeries prior to September 2009. She testified she was told by Dr. Berkin and Dr. Vaught that her neck could be re-injured and suffer a fracture at the C5-C6 level.

Mary was asked by the Attorney General's Office if she could do work with one good arm and she said that would still be difficult because she should not hold her neck in one position for an extended amount of time. She testified that before September 2009, she did not have any prior neck problems and now cannot turn her head to the right.

She testified that she had known David Propst, the manager of the Radio Shack store, through her work with her grandson's Boy Scouts. She testified on July 1, 2010, that she had quit drinking and on January 6, 2011, had quit using prescription drugs. She testified she had not been disciplined or demoted at any of her jobs. She was unable to explain why in Dr. Berkin's report he reported that she drank occasionally.

### **Employee's Exhibits**

Exhibit "A" is records from the Maryland Heights Orthopaedic Arthroscopic Associates, P.C. and indicate that the Employee underwent surgery on her right wrist for deQuervain's tenosynovitis. Those records are dated February 2, 1996.

Employee's Exhibit "B" is records from Cape Family Practice/Dr. Anthony Keele. Those records reflect that Mary was treated for various medical conditions but did receive injections concerning her arms.

Employee's Exhibit "C" is a copy of a letter dated October 11, 2011, from Dr. Anthony Keele of the Cape Family Practice. He states that he had been treating Mary for chronic left epicondylitis beginning March 2008 and had administered injections over approximately three years. The epicondylitis is considered an overuse injury caused from repetitive pronation and supination of forearm during either exercise or work.



Employee's Exhibit "D" is copies of records from Orthopaedic Associates. Those indicate that in January 2007, Mary was seen by Dr. Brian Schafer for problems in her right shoulder. She was diagnosed with either tendonitis or rotator cuff tear and injections made into her shoulder. The records indicate that she also received physical therapy and improved to the point where she was released without restrictions on March 21, 2007. However, she returned to follow up with her rotator cuff on April 4, 2007, May 11, 2007 and was again released on May 11, 2007. The records include a note dated February 19, 2010, indicating that Mary had suffered new injury on September 3, 2009, while at work. She was carrying a mattress panel to sewing area swung it back and tossed it on top of the other panels and had pain in her right shoulder. She underwent arthroscopy on the right shoulder on May 17, 2010, including arthroscopic subacromial decompression, distal clavicle excision and debridement of a partial thickness rotator cuff tear. She underwent a functional capacity evaluation and on October 9, 2010, Dr. Schafer released her and stated she was able to function at the medium physical demand level.

Employee's Exhibit "E" is an Operative Report from Physician's Alliance Surgery Center dated May 17, 2010, indicating that Dr. Brian Schafer performed surgery on Mary's right shoulder.

Employee's Exhibit "F" is records from Brain and Neurospine Clinic. Those indicate that Dr. Kevin Vaught operated on Mary's neck on February 4, 2010, for C5-6 spondylosis and stenosis.

Employee's Exhibit "G" is a copy of a functional capacity evaluation from Work Strategies. It indicates that Mary was capable of functioning at the medium physical demand level.

Employee's Exhibit "H" is the deposition of Dr. Shawn Berkin. Mary saw Dr. Shawn Berkin at the request of her attorney. Dr. Berkin is a medical doctor licensed in the State of Missouri, who performed an independent medical evaluation of Mary at the request of Mary's attorney. The evaluation involved a review of Mary's treatment records, physical examination and taking history from the Employee. Dr. Berkin testified that Mary had pre-existing conditions prior to the September 3, 2009 injury including, right shoulder strain with rotator cuff tendonitis and shoulder impingement from October 2006; left lateral epicondylitis from 2008; and history of deQuervain's tenosynovitis in the wrist. In his deposition, Dr. Berkin testified that these pre-existing conditions represented a hindrance to her employment and that they created a substantially greater disability than the simple sum or total of each separate injury or illness. Dr. Berkin testified that Mary was unable to return to work as a result of the combination of the pre-existing conditions and the incident from 2009. He recommended that there were several restrictions that severely limited her activities. Dr. Berkin did not feel that Mary was capable of returning to her previous job as a production worker for Campbell Mattress and that considering the nature and extent of her disabilities, coupled with her age and limited education, he did not feel that she was capable of competing for and maintaining gainful employment in the open labor market. He stated he did not feel that she was capable of working consistently eight hours a day for five days a week and was permanently and totally disabled to work. Upon cross-examination from the Attorney General's Office, Dr. Berkin testified that the restrictions he recommended would not be as great if you considered the last injury alone.

Employee's Exhibit "I" is the deposition of Dr. Jeffrey Magrowski. Dr. Magrowski testified that he is a certified rehabilitation counselor that has worked in the field of vocational rehabilitation since 1978. He testified that he has performed vocational rehabilitation evaluations on behalf of employees and employers. He is certified as a rehabilitation counselor, rehab economist, disability management specialist, vocational evaluator and certified as a diplomat with the American Board of Vocational Experts. Being a diplomat is the highest achievement with that organization. He has testified in all types of cases as a vocational expert. Dr. Magrowski noted the recommendations of Dr. Berkin involving physical activities. He discussed Mary's attempt to return to work after being released from Campbell Mattress Company with Radio Shack. He indicated that Mary had difficulty in comprehension or understanding her duties so they made her job a part-time seasonal work and let her go. Dr. Magrowski testified that the restrictions recommended by Dr. Berkin were substantial and noted that the need to take frequent breaks would be a problem with any type of employment. He testified that the different injuries that Mary had would be a hindrance to her employment. He testified that Mary is unemployable in the open labor market. He testified that if she were to find a job she would need some assistance from the State Vocational Rehabilitation but that with her serious mental problems and physical restrictions she would be unsuccessful in finding a job. He testified it was from the combination of her previous injuries and last accident that made her unemployable.

Employee's Exhibit "J" is a copy of a Stipulation for Compromise Settlement for Injury Number 95-168057 which represents a settlement of 10% of the right arm at the 175 week level.

Employee's Exhibit "K" is a Stipulation for Compromise Settlement for Injury Number 06-136224 which represents a settlement of 7.2% of the right arm at the shoulder level.

Employee's Exhibit "L" is a Stipulation for Compromise Settlement for Injury Number 08-124489 representing 12.5% permanent partial disability at the level of the left elbow.

Employee's Exhibit "M" is a Stipulation for Compromise Settlement for Injury Number 09-105905 representing 25% permanent partial disability of the right shoulder and 25% of the body as a whole referable to the neck.

Employee's Exhibit "N" is a copy of a statement from David Propst who is identified as the manager of the Radio Shack in West Park Mall indicating that he hired Mary Slinkard because of her knowledge as an intelligent person who was reliable and with good people skills. However, he states that Mary had difficulty in grasping and understanding systems used at Radio Shack and also had physical problems doing the duties of her job.

Employee's Exhibit "O" is a copy of records from Community Counseling Center indicating that Mary had sought treatment for alcohol and prescription pain medication abuse.

**RULINGS OF LAW:***Issue 1. Liability of Second Injury Fund*

The only issue to be decided in this case is whether or not the Second Injury Fund is liable for either permanent partial disability or permanent total disability. The Employee presented evidence which, if credible, established that she is permanently totally disabled due to a combination of her pre-existing disabilities and the disabilities that resulted from her September 3, 2009 accident. The Second Injury Fund offered no expert opinion, not even records review, to contradict, offset or diminish the testimony, credibility and opinions of Dr. Shawn Berkin and Dr. Jeffrey Magrowski.

At the hearing, it was evidently clear that the Employee is disabled. A description of her typical day is that she partakes in a few activities such as going to church for Bible study and attending sobriety classes. She used to have many physical activities including crocheting, yard work and Boy Scout leadership. The testimony of Dr. Berkin and Dr. Magrowski support this. To deny the case against the Employee, the Court would have to rule the testimony of the Employee, the testimony and opinions of Dr. Berkin and Dr. Magrowski are not credible in any way. The Court is not prepared to do that, more importantly, there is no evidence that would justify the Court taking such a position.

The Employee is claiming that she is permanently and totally disabled. The term “total disability” in Section 287.030.7 RSMo., means the inability to return to any employment and not merely inability to return to the employment which the employee was engaged at the time of the accident. The phrase “inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. See Kowalski v. M. G. Metals & Sales, Inc. 631 S.W.2d 919, 922 (Mo.App.1992). The test for permanent total disability is whether, given the employee’s situation and condition, he or she is competent to compete in the open labor market. See Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo.App.1992). Total disability means the “inability to return to any reasonable or normal employment”. An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of the State of Missouri 795 S.W.2d 479, 483 (Mo.App.1990).

The key question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person’s present physical condition, reasonably expecting employee to perform the work for which he or she entered. See Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo.App.1993), Garcia v. St. Louis County, 916 S.W.2d 263 (Mo.App.1995) and Molder v. Treasurer of the State of Missouri, W.D.72977 (Mo.App.2011). The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo.

The first question that must be addressed is whether the Employee is permanently and totally disabled. If the Employee is permanently and totally disabled, then the Second Injury Fund is

only liable for permanent total disability benefits if the permanent disability was caused by a combination of the pre-existing conditions and injuries from the September 3, 2009 accident. Under Section 287.220.1, the pre-existing injuries must also have constituted a hindrance or obstacle to the employee's employment or re-employment.

There is both medical and vocational evidence addressing the issue as to whether or not the Employee is permanently and totally disabled. The opinions of Dr. Berkin and Dr. Magrowski were that the Employee was permanently and totally disabled and this evidence was not disputed by any other professional or credible evidence. The Employer/Insurer settled with the Employee on the primary issue concerning disabilities that resulted from the September 3, 2009 accident. The Second Injury Fund does not challenge the Employee's experts' opinions with other expert opinion.

Based upon a review of all the evidence, the Court finds that the opinions of Dr. Berkin and Dr. Magrowski are credible regarding whether the Employee is permanently and totally disabled.

In addition to both the medical and vocational evidence, the Court finds that the Employee was a credible and persuasive witness on the issue of her disabilities and permanent total disability. The Employee's testimony supports a conclusion that she is not able to compete in the open labor market.

Based upon the credible testimony of the Employee and supporting medical and vocational rehabilitation evidence, the Court finds that no employer in the usual course of business would reasonably be expected to employ the Employee in her present physical condition and reasonably expect the Employee to perform the work for which she was hired. The Court further finds that the Employee is unable to compete in the open labor market and is permanently and totally disabled.

As previously stated, the Second Injury Fund is only liable for permanent total disability benefits if a permanent disability was caused by a combination of pre-existing injuries and conditions of the injury of September 3, 2009. Under Section 287.220.1, the pre-existing conditions must also have constituted a hindrance or obstacle to the Employee's employment or re-employment.

Dr. Berkin assessed 15% permanent partial disability of the right upper extremity at the level of the shoulder for the 2006 pre-existing condition, 15% of the left upper extremity at the level of the elbow for the pre-existing 2008 injury. In regard to the primary injury of September 3, 2009, he assessed 40% of the body as a whole at the level of the cervical spine and 35% of the right upper extremity at the level of the shoulder.

Dr. Berkin also testified that these disabilities create a synergistic effect or a greater effect than their simple sum. Those opinions were not challenged by any other expert opinion.

A Stipulation for Compromise Settlement was entered into by the Employee and the Employer/Insurer and was approved by the Division. Settlement was based upon 25% disability at the level of the right shoulder and 25% of the body as a whole referable to the neck. The Court

finds that as a result of the September 3, 2009 accident the Employee sustained permanent partial disability. A compromise settlement with the Employer/Insurer lends additional support to such a finding. Based upon the consideration of all the evidence the Court finds that as a direct result of the last injury the Employee sustained a permanent-partial disability of 25% of the right shoulder and 25% of the body as a whole referable to the neck.

The next issue to be addressed is whether the Employee's pre-existing conditions were a hindrance or obstacle to her employment or re-employment. Employee testified as to the effects of the pre-existing conditions on her ability to work prior to September 3, 2009. Both Dr. Berkin and Dr. Magrowski discussed the pre-existing disabilities and testified on behalf of the Employee. There is no question that the statements or credibility of the Employee are critical in assessing the concept of hindrance or obstacle in all other issues in the case. There is no credible evidence disputing whether the Employee's prior injuries were debilitating in some sense and created some hindrance/obstacle, some difficulty in completing her job assignments. The Employee provided examples of how her prior injuries affected her physically. Again, the Court found Employee's testimony to be reliable and credible in this area. The experts found that the Employee's prior injuries were debilitating. Dr. Berkin provided a rating for permanent partial disability as to those pre-existing conditions. Based upon a review of all the evidence the Court finds that the Employee's pre-existing disabilities and conditions constitute a hindrance or obstacle to her employment or re-employment.

Dr. Berkin testified that the pre-existing disabilities and the disabilities associated with the injury of September 3, 2009, combine to create a greater overall disability. He specifically testified that the Employee's permanent total disability is a combination from the primary and pre-existing injuries from a synergistic interaction. He testified that the Employee was permanently and totally disabled and a combination from a physical standpoint. Dr. Magrowski testified that the Employee is unemployable in the open labor market and was permanently and totally disabled from a vocational standpoint. All those opinions were unchallenged.

Based on all the evidence presented, I find that the prior injuries combine synergistically with the primary injury to cause the Employee's overall conditions and symptoms. Based on the credible, undisputed testimony of the Employee, which is supported by the credible, uncontradicted testimony of Dr. Berkin and Dr. Magrowski, the Court finds that the Employee is permanently and totally disabled as a result of the combination of her pre-existing conditions and injuries and the September 3, 2009 injury.

The remaining issue is whether or not the part-time work the Employee engaged in following her release from the care of her physician from the September 3, 2009 injury at Radio Shack disqualifies her from being permanently and totally disabled. Employee testified that she last worked at Radio Shack on December 24, 2010. She originally started work at Radio Shack as a full time worker but was demoted to a seasonal worker because of her physical and mental difficulties. She was let go as of December 24, 2010. Employee's Exhibit "N" is a statement from the manager, David Propst, who hired her at Radio Shack. He testified that he had known Mary Slinkard for several years and that she was intelligent and had good people skills and was reliable and thought she would be a good employee. However, as she worked at Radio Shack,

she had difficulty in grasping and understanding the systems at use at Radio Shack. He stated that she also had physical problems doing the duties of her job and this included moving and lifting heavy items and being on her feet for long periods of time. This work was very limited in time.

A recent case in the Western District of Missouri is Molder v. Treasurer of the State of Missouri W.D. 72977 (Mo.App.2011). That case is very similar to that of the Employee in that Molder was working but it was limited and sporadic. The Court recognized that the test is whether or not “total disability means the inability to return to any reasonable employment. It does not require that the Employee be completely inactive or inert”. Based on all the evidence presented, I find that the Employee was permanently and totally disabled despite her attempt to return to work at Radio Shack.

Based on all the evidence presented, I find that the Employee sustained 25% of the right shoulder at the 232 week level, 25% of the body as a whole referable to the neck. This totals 158 weeks of permanent partial disability.

According to the stipulation of the parties, the Employee’s maximum medical improvement date was October 9, 2010. Adding the 158 weeks to the maximum medical improvement date of October 9, 2010, the Second Injury Fund assumes liability for permanent total disability benefits on October 23, 2013.

Since the Employee has been awarded permanent total disability benefits against the Second Injury Fund, Section 287.200.2 RSMo. mandates that the Division “shall keep the file open in the case during the lifetime of any injured employee who has received an award of permanent total disability.” Based on this section and the provisions of Section 287.140 RSMo., the Division and Commission should maintain an open file in the Employee's case for purposes of reviewing the status of the Employee's permanent disability pursuant to Sections 287.140 and 287.200 RSMo.

#### **ATTORNEY'S FEES:**

Chris N. Weiss, Attorney at Law, is allowed a fee of 25% of all sums awarded under the provisions of this Award for necessary legal services rendered to Employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

#### **INTEREST:**

Interest on all sums awarded hereunder shall be paid as provided by law.

Employee: Mary Slinkard

Injury No. 09-105905

Made by:

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Maureen Tilley  
*Administrative Law Judge*  
*Division of Workers' Compensation*